

RANDY L. TESCH)	
Claimant)	
VS.)	
)	
MARGWEN, INC. d/b/a SEARS RETAIL STORE)	Docket No. 259,417
Respondent)	
AND)	
)	
SAFECO INSURANCE COMPANIES)	
Insurance Carrier)	

Claimant, on the other hand, requests the Appeals Board to affirm the ALJ's preliminary hearing order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Appeals Board finds the preliminary hearing Order should be affirmed.

Before claimant started working for the respondent on August 16, 1999, claimant injured his low back in 1993 during a lifting incident while employed by another employer. At that time, because claimant's employer did not have workers compensation coverage, the only medical claimant received for the back injury was a one-time visit at the hospital emergency room and one physical therapy session. The low back injury was severe enough, however, to keep claimant off work for two months. After claimant returned to work, on occasion, after heavy lifting or excessive bending, claimant would experience periods of pain and discomfort in his low back.

Claimant testified he and another employee, on May 22, 2000, were unloading a truckload of electronic equipment, washers, and dryers. This truckload contained an unusual number of Kenmore front-loading washers and dryers. The washers and dryers were unloaded from the truck by loading them on a hand dolly and then pushing the hand dolly down a 20-foot ramp. Because of the incline of the ramp, claimant had to hold the loaded dolly back and ease it down the ramp. This placed a strain on claimant's back, and he felt increased pain and discomfort after he unloaded the truck.

Claimant admitted that on occasion his low back was symptomatic after the 1993 injury. But claimant testified that after he unloaded the truck on May 22, 2000, his low back pain was much worse than he had normally experienced after he had performed heavy work. The pain persisted until claimant decided to seek medical treatment through his family physician, Brian Billings, M.D.

Claimant first saw Dr. Billings on May 26, 2000. Dr. Billings' medical records were admitted into evidence. In Dr. Billings' medical note dated May 26, 2000, he recorded a history that he took from claimant that is almost completely illegible. Respondent interprets Dr. Billings' history to read that claimant told Dr. Billings only that he had back pain since an incident ten years ago, and claimant did not give any history of a recent accident. But the Appeals Board has reviewed Dr. Billings' May 26, 2000, medical note and finds the note goes on to indicate that pain seemed to be getting worse with heavy lifting.

Dr. Billings had claimant undergo an MRI examination on June 5, 2000. The MRI examination showed a degenerative disc at L5-S1 which was accompanied by a Grade I spondylolisthesis. He took claimant off work as of June 16, 2000. Dr. Billings then referred claimant to orthopedic surgeon D. Troy Trimble, D.O., in Wichita, Kansas, for further evaluation and treatment recommendations.

Dr. Trimble saw claimant on August 3, 2000. Dr. Trimble's medical report does not contain a history of claimant's alleged May 22, 2000, accident. But the medical report does

contain a history of claimant's July 1993 accident. Claimant testified, however, that he told Dr. Trimble about the most recent accident of May 22, 2000. Dr. Trimble diagnosed claimant with L5-S1 disc degeneration with a Grade II L5 on S1 isthmic spondylolisthesis. Dr. Trimble recommended surgical intervention to improve claimant's symptoms. The surgery was described as an L5 Gill laminectomy and an L4 to S1 or L5 to S1 fusion with instrumentation. Dr. Trimble also found claimant to be a symptom magnifier but with significant organic pathology.

Claimant testified that after he unloaded the truckload of appliances on May 22, 2000, he saw respondent's co-owner, Katherine McKim, and notified her at that time, "[I]t was a heavy truck and my back's killing me." Ms. McKim, however, also testified in person before the ALJ at the preliminary hearing. She was asked if claimant told her on the morning of May 22, 2000, that after he unloaded the truck his back was killing him. She replied, "I don't- - he could have, I just don't know for sure."

Cynthia K. Van Stratten, a sales person employed by the respondent, also testified in person before the ALJ at the preliminary hearing. Both Ms. Van Stratten and Ms. McKim testified claimant complained of low back pain while he was working for the respondent even before the May 22, 2000, alleged accident. Ms. McKim testified claimant related those complaints to his previous 1993 work injury while employed by another employer. Furthermore, Ms. Van Stratten testified claimant related his low back complaints to an incident at home.

Respondent contends claimant has failed to prove that his present low back condition and need for medical treatment have any relationship to an alleged May 22, 2000, work-related accident. Respondent argues claimant's low back condition and need for medical treatment are the result of the 1993 work accident while claimant was employed by another employer. Respondent argues this conclusion is supported by the fact that claimant did not receive proper medical treatment for the 1993 injury and, therefore, claimant's low back remained symptomatic. Additionally, respondent asserts claimant failed to provide both Dr. Billings and Dr. Trimble, who saw claimant after the alleged May 22, 2000, accident, with a history of such accident. The only history claimant related to these physicians was a history of the 1993 accident. Also, respondent argues, both Ms. Van Stratten and Ms. McKim verified that claimant had low back complaints and symptoms while he was working for the respondent before the alleged May 22, 2000, accident.

The Appeals Board finds the preliminary hearing record contains medical records and testimony from Ms. McKim and Ms. Van Stratten that directly conflicts with claimant's testimony. The Appeals Board finds the ALJ, in granting claimant preliminary hearing benefits, had to conclude that claimant's testimony was truthful. The ALJ had the opportunity to evaluate all of the witnesses' credibility as all witnesses testified in person at the preliminary hearing. In circumstances such as this, where conflicting evidence provides more than one possible answer, the Appeals Board finds it is appropriate to give

some deference to the ALJ's conclusions. Therefore, at this point in the proceedings and giving some deference to the ALJ's conclusions, the Appeals Board finds claimant proved the May 22, 2000, work-related accident permanently aggravated claimant's preexisting low back condition, and claimant provided respondent with timely notice of the accident.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore on November 3, 2000, should be, and the same is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of December 2000.

BOARD MEMBER

c: M. John Carpenter, Great Bend, KS
Gregory D. Worth, Lenexa, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director